87-1510

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Federal Communications Commission ("FCC") began requiring cable systems to retransmit the signals of local television broadcast stations in the mid-1960s. Its statutory authority to impose such requirements was upheld by this Court in 1968. Thereafter the agency's rules were consistently upheld on challenges on First Amendment grounds until 1985, when the lower court held the must carry rules unconstitutional. Two years later, in the decision this Court is now asked to review, the lower court held unconstitutional new and much more limited must carry rules adopted by the FCC in an effort to meet the strictures of the 1985 decision.

The questions presented are:

1. Do federal regulations requiring cable television systems to retransmit the signals of local television broadcast stations constitute an incidental or an even more serious burden on the First Amendment interests of cable television operators?

2. On judicial review of an administrative agency rulemaking decision to adopt regulations that constitute an incidental burden on freedom of speech, what degree of deference, if any, should be accorded to the agency's judgments that the regulations serve a substantial governmental interest and are narrowly tailored to serve that interest?

LIST OF PARTIES

The decision below was rendered on consolidated petitions for judicial review of an administrative agency rulemaking decision. The petitioners below were Century Communications Corp. and 13 other cable television operators[1] and Richard S. Leghorn, all of whom contended that the new rules unconstitutionally infringed the First Amendment rights of cable television operators, and Hubbard Broadcasting, Inc., which claimed that the new rules unlawfully discriminated against certain broadcast facilities. The intervenors aligned with petitioners were United Church of Christ, which claimed that the FCC's decision was arbitrary and capricious, and National Independent Television Committee, Spanish International Communications Corporation and Univision, Inc., which argued that the rules deprived certain broadcast stations of must carry rights. Respondents were the Federal Communications Commission and the United States of America. Intervenors aligned with respondents were the National Association of Broadcasters, the Association of Independent Television Stations, Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service. Appearances were entered for Lincoln Broadcasting Co. and the National Cable Television Association and certain of its cable

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[1] The 13 other cable operators were Chasco Cablevision, Ltd.; Clearview Cablevision Associates II; Columbia Associates, L.P.; Daniels & Associates, Inc.; Landmark Cablevision Associates; Monmouth Cablevision Associates; Masada Communications, Inc.; National Cablesystems, Inc.; OCB Cablevision, Inc.; Ocean Associates; Riverview Cablevision Associates; St. Charles CATV, Inc.; United Cable Television Corp.

television members, but these parties did not file briefs.

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Petitioner National Association of Broadcasters ("NAB"), an intervenor below, is a nonprofit trade association representing more than 5,000 radio stations, 940 television stations and the major commercial broadcast networks.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reproduced in the separately bound Petitioners' Appendix ("App.") at pp. 1a-28a and is reported at 835 F.2d 292. A January 29, 1988 order by the Court of Appeals granting a motion for clarification is reproduced in the Appendix at pp. 29a-31a. The underlying agency decision is reported as *Report and Order in Docket No. 85-349*, 1

FCC Rcd 864 (1986), and is reproduced in the Appendix at pp. 32a-204a. The agency's decision on reconsideration of that decision is reported as *Memorandum Opinion and Order in Docket No. 85-349*, 2 FCC Rcd 3593 (1987), and is reproduced in the Appendix at pp. 205a-330a.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AGENCY REGULATIONS INVOLVED

The FCC rules held unconstitutional by the court below are reproduced in Appendix B to the FCC's decision (App. 177a-88a) and are codified at 47 C.F.R. §§ 76.56, 76.58, 76.60 and 76.62.

STATEMENT OF THE CASE

The FCC began to regulate community antenna television, or "CATV" systems as they were then known, in the mid-1960s. The FCC's jurisdiction to regulate CATV use of broadcast signals was promptly upheld by this Court as being reasonably ancillary to the agency's statutory duties and responsibilities with regard to over-the-air television broadcasting. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). The rules at issue in *Southwestern* required cable systems, as a condition to any use of broadcast signals, (1) to retransmit the signals of nearby or "local" broadcast stations, (2) to refrain from duplicating the network programs of local stations by retransmitting the signals of other stations that were broadcasting those network programs and (3) in certain circum-

stances, to refrain altogether from bringing in distant broadcast signals from other markets. These rules, including the first or so-called "must carry" element, were subsequently found to be valid under the First Amendment.[1]

Cable systems offer two distinct services: (1) enhancement of the technical quality of signals of local broadcast stations, and (2) distribution of programs or signals not otherwise available in the cable community. The former is a reception service that typically provides clearer pictures than viewers can obtain with their own antennae.[2] The latter service in the early years of cable development consisted largely of distant broadcast signals. But with the advent of communications satellites in the mid-1970s, cable television systems have increasingly offered access to various program services created specifically for distribution over cable television systems. Many of these cable program networks are supported by advertising (as well as by subscriber charges) which is sold by both the cable networks and by cable operators. In theory, a wire television service could operate completely independent of over-the-air broadcasting by distributing only programs originated by cable oper-

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[1] Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). *See also*, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972) (plurality opinion) (observing that *Black Hills* "correctly upheld" must carry regulations).

[2] Hills, mountains or even large man-made structures between the station transmitter and the viewer can interfere with reception of some or all local stations even when a top-quality roof-top antenna is employed. Moreover, many viewers cannot use roof-top antennae due to restrictive zoning ordinances or simply because they live in apartment buildings or other multiple dwelling units.

ators or their networks. *Cf. Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (Cal.), *cert. denied*, 385 U.S. 844 (1966). But in practice all known cable systems since at least the early 1960s have offered and provided broadcast service.

In 1985, in the precursor to the decision below, the lower court held that then current must carry rules, which were significantly broader than those at issue here, were unconstitutional. *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (hereinafter "*Quincy*"). A series of circuit court precedents upholding the constitutionality of the FCC's must carry and other rules regulating cable television use of broadcast signals[3] was dismissed as unsound because they mistakenly treated cable as indistinguishable from broadcast television. In selecting the appropriate "standard of review" for First Amendment purposes, the *Quincy* panel noted cable television systems theoretically have the technological capacity to distribute 200 or more channels over a single wire, and concluded that regulation of cable television could not be justified under the so-called spectrum-scarcity rationale sometimes relied on to justify regulation of the content of broadcast programs. 768 F.2d at 1443-44, 1447-50. The panel conceded that the must carry rules do not forbid speech by the cable operator. It nevertheless thought that, in light of the many newer non-broadcast ser-

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[3] Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968); Titusville Cable TV, Inc. v. United States, 404 F.2d 1187 (3d Cir. 1968); Conley Electronics Corp. v. FCC, 394 F.2d 620 (10th Cir. 1968). Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

vices cable systems could distribute relative to the rather limited channel capacity at which many systems were operating (*see generally* 768 F.2d at 1451-53), cable television could no longer be regarded as merely a passive conduit for broadcast signals and that must carry requirements therefore "severely impinge on [the] editorial discretion" of cable operators to select program material to exhibit over their wire. *Id.* at 1453.

The *Quincy* panel considered but backed away from declaring the rules presumptively unconstitutional, concluding it was unnecessary to resolve that issue because the rules were unconstitutional even if regarded as no more than an "incidental burden" on speech within the meaning of *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See generally id.* at 1454-62. Stressing that it was addressing only what it regarded as the overly broad must carry rules then before it, the panel observed that the FCC was free to craft new must carry rules that would be more responsive to the court's First Amendment concerns. *Id.* at 1463. Four months later, while a petition for review of the *Quincy* decision was pending before this Court, the FCC started a rulemaking proceeding to explore whether new must carry rules were necessary and what sort of rules would satisfy the Court of Appeals.

NAB and many others urged the FCC to adopt new rules. Without such rules cable systems were likely to refuse to carry some local stations or to place burdensome conditions on carriage; and indeed, this had already begun to occur.[4] Many cable viewers

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[4] In addition to instances in which cable systems refused to

would be effectively denied access to the program services of any local stations not available on the cable due to the cost, inconvenience and in some instances the impossibility of receiving acceptable signals without cable. Even when the over-the-air alternative was feasible, cable subscribers would be forced to buy and install both their own antennae (and would in many cases need a relatively expensive outdoor antenna) and input selector devices or "A/B switches," to change back and forth between cable and over-the-air reception. Moreover, those switches were inconvenient and to some extent unreliable. NAB's survey evidence demonstrated that only about one percent of current cable subscribers are equipped to receive signals over-the-air and many others are forbidden by local zoning ordinances and other restrictions from installing outdoor antennae. The survey also indicated that better reception of local signals was seen as one "very important" reason for buying cable service by some 64 percent of the responding subscribers.

The net result of the inconvenience of reverting to over-the-air reception and of the fact that cable subscribers rarely have the option of buying cable service from a competing company was to bestow on each cable operator "gatekeeper" status over the television service available to its subscribers. The increasing de-

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begin carrying newly operational local stations or dropped some newer stations that had been carried only briefly, some systems attempted to charge broadcasters for carriage or shifted local stations to less desirable positions on the cable dial. Such "channel repositioning" seems to be aimed at enhancing the viewing of the cable program networks within which cable operators sell advertising on their own behalf.

gree to which cable operators directly compete for advertising revenue with broadcast stations creates an incentive to use that status to deny carriage to some competing broadcast stations. Noncarriage also frustrates the basic allocations policy of the Communications Act of insuring the availability of local broadcast service.

In its *Report and Order*, the FCC accepted the *Quincy* decision's characterization of cable television as a "full-fledged video" service that offers alternative program services and that exercises "broad editorial control over content." App. 93a. The FCC nevertheless found that some must carry regulation would further a substantial federal interest. It noted first what it characterized as a widespread public misconception that subscribers did not need to install or maintain the capability to receive broadcast signals over-the-air. That misconception was attributed to the former must carry rules and to cable operators who may offer to remove, free of charge, the new customer's "unsightly antenna." The agency also took into account the facts that cable penetration and the sales of cable-ready television receivers had greatly increased in recent years, while sales of both outdoor and indoor antennae were dropping significantly. App. 98a-100a. Further, the FCC cited and relied on evidence indicating that, even in the brief period following the *Quincy* decision, cable systems were ceasing to add some new local stations and starting to drop some others, particularly newer independent and public television stations. App. 55a-57a, 104a-05a. If unchecked, the confluence of these perceptions and trends could deprive millions of cable subscribers of

the program diversity which access to all local stations as well as cable programming could provide.

The FCC reasoned that the federal interest in maximizing program diversity would be best served if viewers had the ability to receive both cable services and, via over-the-air reception, whatever broadcast signals cable systems chose not to carry. To achieve that end, and to comply with what it thought *Quincy* required, the FCC adopted a new regulatory scheme consisting of (1) substantive must carry rules that were very limited in scope; (2) requirements that cable operators (a) offer input selector devices (A/B switches) to new and existing subscribers free of charge and (b) distribute "consumer education" statements describing how to receive local signals not carried by the cable system and listing any local stations that were not being carried; and (3) a "sunset provision" to terminate the new substantive must carry rules in five years' time in the hope that by then the public would no longer be accustomed to relying on cable operators to provide reception of local broadcast signals. Cable systems with fewer than 21 activated channels were virtually exempt from must carry obligations under the new substantive rules. Other cable systems were required to devote no more than a relatively small portion (generally 25 percent) of their channels to must carry signals. Cable systems were also free to carry no more than one local affiliate of the same network and to drop stations that, after being on the air for a full year, attracted only a negligible amount of viewing in noncable homes.

Appalled at the prospect of having to purchase and install millions of "A/B switches," cable industry representatives petitioned for reconsideration of that re-

quirement, supporting their claims with an engineering study showing that the existing input selector devices were unreliable, that even for cable industry technicians, installing the devices was difficult, particularly where other equipment such as a videocassette recorder was attached to the television receiver, and that the cost to cable operators of complying with the FCC switch requirements could be as high as a billion dollars. App. 211a-213a, 215a-217a. NAB and other broadcast representatives sought reconsideration of the sunset provision, arguing that the major obstacles to over-the-air reception by cable subscribers were not likely to disappear in five years and that there were sound policy reasons for maintaining must carry obligations indefinitely.[5] The FCC largely granted the relief sought by the cable industry, but otherwise adhered to its original decision.[6]

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[5] Among viewers accustomed to changing stations with handheld remote control tuners, and particularly among viewers who are not technically inclined or are physically handicapped, a station that can be received only after finding and changing an "A/B switch" located behind the television set to switch from a cable to a noncable source of signals is at a distinct competitive disadvantage in terms of picking up audience from those who are sampling the readily available channels. Prior to *Quincy* the FCC repeatedly recognized that the inconvenience of using A/B switches, even if they functioned properly, would put stations not carried on the cable system at a serious competitive disadvantage vis-a-vis the stations the system did carry. *See, e.g.*, First Report and Order in Docket No. 14895, 38 F.C.C. 683, 702-03 (1965); Memorandum Opinion and Order in Docket No. 84-136, 55 Rad. Reg. 2d (Pike & Fischer) 1365, 1367 (1984).

[6] NAB did not petition for judicial review of the FCC's "sunset" rule since it was at least arguably not ripe for immediate review and the agency itself recognized that it might have to

In its decision below, the Court of Appeals struck down the FCC's new and far less intrusive must carry rules. Treating *Quincy* as binding precedent, the lower court first concluded that any must carry rules constitute at least an incidental burden on the First Amendment rights of cable operators. Like *Quincy*, the panel declined to reach the question whether must carry rules were *per se* unconstitutional because the new rules could not pass muster under *United States* v. *O'Brien*, 391 U.S. 367 (1968).

The panel began its *O'Brien* analysis by holding that the substantial deference normally accorded to administrative agency decisionmaking "has little relevance when first amendment freedoms are even incidentally at stake." App. 16a. The FCC's judgment on the need for must carry regulation was rejected as resting "not upon substantial evidence but rather upon several highly dubious assumptions of the FCC" (App. 18a) that (1) consumers are not aware and cannot be expected to become aware within five years that an A/B switch will suffice to insure access to local signals (App. 19a-24a) and (2) in the absence of must carry requirements cable systems would discontinue retransmitting local stations. App. 25a-26a. The lower court also thought that five years of regulation was unnecessary so that the agency's rules were not "narrowly tailored" to achieve their stated objective. The panel was "unpersuaded" that five years was appropriate largely because of "our perceptions about consumer aptitude . . .." App. 27a. The panel rejected what it characterized as the FCC's "sluggish profile of the American consumer" because

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revisit the need for substantive regulation before the five-year period expired. *See* App. 110a.

> "[i]n a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact disk-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within a span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows."

(App. 24a (footnote omitted). See also App. 27a.)

The panel later clarified its decision by explaining that it only held the substantive must carry rules unconstitutional, not the FCC's consumer education and remaining A/B switch requirements. App. 31a. This and other petitions followed.

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That Content-Neutral Must Carry Rules For Cable Television Implicate Serious First Amendment Concerns Is Inconsistent With Prior Decisions Of This Court, Conflicts With Other Lower Court Decisions And Has Profound Implications For The Regulation Of Electronic Communications.

The result below frustrates adoption and enforcement of even a greatly watered-down version of agency regulations of many years standing. Yet (1) every judicial decision prior to *Quincy* had upheld those regulations, (2) the cable petitioners below failed to present the lower court with a single concrete instance in which the new, limited must carry rules

would prevent a cable operator from distributing some other program service, (3) only three years ago this Court relied upon the FCC's must carry requirements as embodying "a strong and substantial" federal interest requiring preemption of inconsistent state law,[7] and (4) Congress took special care not to disturb the long-established must carry policy in the course of adopting comprehensive cable television legislation in 1984.[8]

Tens of millions of American households currently rely on cable television for both broadcast and other television services. By reading the First Amendment as giving cable operators the power to be the sole arbiters of the broadcast as well as nonbroadcast services distributed over cable, the lower court has made the television choices that are available to these homes largely dependent on the economic and political predilections of the only cable operator to provide cable service in any given neighborhood.

The lower court's conclusion that must carry rules seriously impinge on First Amendment values rests on an explicit discussion in *Quincy* of the appropriate "standard of First Amendment review" for cable television and on a more or less implicit assumption in both lower court opinions that cable television operators function in much the same manner as newspaper editors in the sense that they exercise wide latitude or "editorial discretion" in selecting the program services to retransmit over their cables.

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[7] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

[8] *See* Section 624(f), Cable Communications Policy Act of 1984, 47 U.S.C. § 544(f) (Supp. 1987); H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 70 (1984); S. Rep. No. 98-67, 98th Cong., 1st Sess. 11-12 (1983).

On the first of these matters, *Quincy* reasons that the "more forgiving" First Amendment standard said to be applicable to the regulation of broadcasting is inappropriate for cable television, and for that reason the "print model" of First Amendment jurisprudence more nearly applies to cable television. 768 F.2d at 1450. Must carry rules are therefore highly suspect because the print model—and more particularly *Miami Herald Co.* v. *Tornillo*, 418 U.S. 241 (1974)—teaches that "compulsory speech" requirements are highly suspect under the First Amendment. 768 F.2d at 1453. But this either-broadcasting-or-print-model dichotomy must be regarded as suspect on at least three grounds.

First, the cases relying on the so-called spectrum scarcity rationale do so to justify either highly intrusive content-based regulation[9] or a complete barrier to entry into the business through a licensing requirement.[10] But must carry regulation does not limit entry into the business of cable television.[11] Similarly, the obligations must carry rules impose on cable op-

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[9] *E.g.* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). NAB takes issue with the scarcity rationale, believing that it is entirely unjustified under present day circumstances. *See generally* Loveday v. FCC, 707 F.2d 1443, 1458-59 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983). But that question is not presented by this case. Regulation of the use of broadcast signals by cable television does not rest in the soft sand of the scarcity rationale.

[10] *E.g.*, National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).

[11] Must carry rules are for that reason not in any way akin to an allegedly artificial restriction on the number of cable operators. *Cf.* City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986).

erators turn on such content-neutral factors as the distance between the cable system and the broadcast station, the radiated power of the station, whether there is evidence that some people are able to receive the station without the aid of cable, and (in the FCC's most recent version) the channel capacity of the cable system. The ideological content of the station's programs is irrelevant.

Second, First Amendment constraints on "compulsory speech" requirements for print and other non-broadcast media are not nearly as sweeping as the lower court assumes. *See, e.g., PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980); *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376 (1973); *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913) (upholding duty of second-class publishers to file and publish statements regarding circulation and to label all paid editorial content as advertising). In *Miami Herald* the obligation to publish someone else's speech was triggered by a newspaper's decision to publish its own "personal attack" on a politician, the antithesis of content-neutral regulation.

Third, the lower court's print/broadcast dichotomy ignores yet another First Amendment "model," one which holds that content-neutral regulation of the activities of passive carriers or conduits that retransmit the communications of others does not raise substantial First Amendment concerns. No doubt all operators of communications by wire, including telephone and telegraph companies, enjoy First Amendment rights. *Cf. First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). Moreover, as with cable television, the transmissions of telephone and telegraph companies are largely over wire and contain or consist

of constitutionally protected "speech." Yet the quite stringent "must carry" requirements of those companies—embodied in their obligations to operate as common carriers—to transport the messages of many millions of other "speakers" surely are not vulnerable under the First Amendment on the theory that those obligations interfere with a telephone company's "editorial discretion" to pick and choose what messages it wants to deliver.[12]

Several decisions of this Court indicate, albeit outside the First Amendment context, that cable television is a passive carrier insofar as its retransmission of local broadcast signals is concerned. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), for example, this Court concluded that cable systems, like telephone and telegraph businesses, were engaged in electronic communication by wire and were therefore subject to regulation under the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1962), even though cable was neither a broadcast user of the spectrum nor a common carrier within the meaning of Title II of the Act. *See also FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706-07, n.16 (1979) (describing must carry rules as analogous to but far less onerous than full-fledged common carrier access rules which

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[12]*But see* Reply Comments of Bell Atlantic Telephone Companies in FCC Docket No. 87-266, at 9-13 (December 16, 1987) (relying on *Quincy* and the decision below to contend that because cable television is a First Amendment business, telephone companies cannot constitutionally be prohibited from offering cable television services wherever they operate telephone facilities); Reply Comments of BellSouth Corporation, Southern Bell Telephone & Telegraph Co. and South Central Bell Telephone Co. in FCC Docket No. 87-266, at 6 n.9 (December 16, 1987).

would require cable operators to hold out their facilities indifferently for public use).

Only one week after *Southwestern*, this Court held that, insofar as their broadcast signal activities were concerned, cable operators do not "perform" copyrighted works in the way in which a broadcaster performs televised programs for copyright purposes. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968). The Court reasoned that, like the viewer who does not "perform" for copyright purposes when he watches television or changes channels, the cable operator is a "passive beneficiary" of the broadcast service; although "CATV equipment is powerful and sophisticated, . . . the basic function the equipment serves is little different from that served by the equipment [antenna and television set] generally furnished by a television viewer." 392 U.S. at 399.

Modern cable systems, of course, typically transmit a myriad of nonbroadcast program services unlike the relatively primitive systems of 1968. In *Quincy* the lower court attached great significance to this evolutionary change (768 F.2d at 1452), but failed to explain why (or when) it altered cable television's passive conduit role with respect to broadcast retransmission. A similar blurring of the distinct functions of cable television was rejected by this Court when it revisited the copyright issue in *Teleprompter* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). Although cable operators in that case were electing to retransmit some broadcast signals over very great distances by means of radio microwave relay facilities, or were originating some programming on cable channels not used for the retransmis-

sion of broadcast signals, these facts did not change the passive role of cable television with respect to broadcast signals because

> "in none of these [other] operations is there any nexus with defendants' reception and rechanneling of the broadcasters' copyrighted materials. As the [Second Circuit] Court of Appeals observed . . . 'we cannot sensibly say that the system becomes a "performer" of the broadcast programming when it offers both origination and reception services, but remains a nonperformer when it offers only the latter.' "

415 U.S. at 405 (citation omitted).[13] Although the lower court previously recognized that the different functions of cable television may call for different regulatory treatment,[14] it has now created the very nexus this Court rejected in *Teleprompter*.

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[13] The subsequent copyright legislation accorded cable television a compulsory copyright license to retransmit broadcast signals upon payment of nominal fees fixed by the government and upon compliance with certain conditions (simultaneous retransmission without deletion or alteration of program content or commercials) that preclude "editorial discretion." Section 111, Omnibus Copyright Act of 1976, as amended, 17 U.S.C. § 111 (1977 and Supp. 1987). This preferential copyright treatment was thought appropriate in light of such factors as the FCC's must carry rules. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 92-93, 99 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 78-79, 83 (1975).

[14] Home Box Office v. FCC, 567 F.2d 9, 45 n.80 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (concluding that there is "no evidence" that cable distribution of nonbroadcast cable networks and broadcast signal retransmission "are not completely separate

There is also reason to question *Quincy's* rather cavalier dismissal of the "early" cases upholding the constitutionality of the must carry rules.[15] *Southwestern* concluded that must carry regulation was appropriate not because cable used scarce spectrum, but because the FCC had reasonably concluded that such regulation was essential to achieving the goals and objectives of the Communications Act for broadcast service. Likewise, the "early" cases rejected by *Quincy* seem to rest on the rather straightforward premise that cable operators who elect to enmesh themselves in the distribution of broadcast service cannot complain about reasonable conditions on their use of that service. As Chief Justice Burger observed in voting to uphold a highly intrusive FCC-imposed "compulsory speech" requirement for cable television,

> "Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission."

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and distinct activities. . .").

See also National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding unlawful FCC's attempt to preclude state regulation of cable television as a common carrier for purposes of some activities, reasoning that "it is clearly possible for a given entity to . . . be a common carrier with regard to some activities but not others").

[15] *See supra* at 3 n.1, 4 n.3.

United States v. *Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J. concurring in the result).

The lower court's less explicit assumption about the "editorial discretion" of cable operators may have some merit insofar as the cable channels not devoted to must carry obligations are concerned. Thus, an outright prohibition on owning or operating cable facilities that bestows a legal monopoly on a single franchised operator would seem to raise First Amendment concerns. *City of Los Angeles* v. *Preferred Communications, supra*, 476 U.S. at 492-93.

Similarly, a cable operator willing to forego carriage of any broadcast signals, preferring to act as the "programmer" of all of its channels, might have a sound basis for objecting to being conscripted into serving as a reception service for broadcasting, with the attendant loss of "editorial discretion" to control the flow of programs over its channels. But that is not this case. All the cable parties below—and all other cable operators for that matter—function as a reception service for broadcast signals, and none has indicated a desire to discontinue carrying broadcast signals. Far from being an unwilling conscript, cable television has become a multibillion dollar business largely, albeit not solely, because the public desires convenient and enhanced reception of broadcast signals. The lower court's assumption about editorial discretion, as applied to must carry, is no more than a tautology: must carry obligations for those cable operators who choose to retransmit broadcast signals raise serious First Amendment issues because cable operators have "editorial discretion" to pick and choose among broadcast signals.

Unlike the usual distribution chain, in which the contractual arrangements associated with the normal workings of a free marketplace operate to give some assurance that downstream distributors will not exercise their "editorial discretion" to jeopardize the interests of their suppliers, cable television is immune from the limitations that normally govern retail vendors. This anomaly stems from cable television's unique status under the copyright laws. Recognizing that anomaly, the FCC has acted since 1966 to fill the breach with reasonable limitations on cable television use of broadcast signals. And in reliance on the FCC's regulation, the copyright anomaly has been perpetrated. But the lower court, refusing to pay any heed to the complex interrelationship between regulation and copyright (*see Quincy*, 768 F.2d at 1452 n.39, 1454 n.42) now insists that cable television must be treated as an active programmer or "editor" for all of its channels.

This quixotic result ignores the warnings of many thoughtful commentators that First Amendment values dictate regulation of at least some aspects of cable television as a passive conduit or common carrier service.[16] It also casts grave doubt on the Congressional

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[16] *See, e.g.*, Comment, *Berkshire Cablevision v. Burke: Toward a Functional First Amendment Classification of Cable Operators*, 70 Iowa L. Rev. 525, 535-43 (1985); I. Pool, *Technologies of Freedom* 106 (1983); S. Barnett, *Franchising of Cable TV Systems to Get Airing at Supreme Court*, Nat'l L.J. (Apr. 21, 1986) at 44 n.20, col. 3 (describing as "perverse," an outcome that permits the cable operator "in the name of the First Amendment, to stand astride the cable gateway and prevent . . . [other] speakers from reaching the public except at his pleasure").

Quincy relies on "[t]wo influential commissions" to construct

policy of fostering some third-party access requirements for cable television.[17] By blurring and ignoring the distinct functions of cable television, the lower court has turned cable television into a communications chameleon that changes its colors to fit the copyright, First Amendment or other legal issue of the day.

2. The Lower Court Has Misapplied *O'Brien*, Principally By Refusing To Accord Any Deference To The Agency Findings And Conclusions, And This Approach Is In Conflict With The Decisions Of This Court And Various Lower Federal Courts.

Quite apart from the broader First Amendment issue, the lower court's application of the *O'Brien* test warrants review by this Court. The question of the degree of judicial deference to be accorded to administrative agency judgments in support of regulations that constitute "incidental" burdens on First Amendment freedoms is an important one, affecting a wide range of cases. Moreover, the lower court's resolution

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its First Amendment analogy even though both commissions urge the sort of common carrier regulation of cable television that *Quincy* jeopardizes on First Amendment grounds. *Compare* 768 F.2d at 1450 *with* Cabinet Committee on Cable Communications, *Cable: Report to the President*, 20, 51-52 (1974) (urging that cable operators should be relegated to being passive carriers for other programmers when cable reaches 50 percent penetration nationwide) and Sloan Commission on Cable Communications, *On the Cable: The Television of Abundance*, 146-48 (1971) (suggesting that common carrier treatment of cable television is appropriate when cable achieves maximum penetration).

[17] *See, e.g.*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 30-37 (1984) (concluding that such access requirements are constitutional and indeed foster First Amendment values).

of that question appears to represent a serious departure from the prior decisions of this Court.

The lower court held that the "substantial deference" which it normally would accord to administrative decisionmaking has "little relevance when First Amendment freedoms are even incidentally at stake" (App. 16a) and proceeded to overturn the FCC decision based on the panel's different judgments on matters of predictive fact. This approach stands in stark contrast to the norm for judicial review of agency rulemaking decisions. Time and again this Court has pointed out that a reviewing court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Such "Monday morning quarterbacking" is prohibited because it "fundamentally misconceives the nature of the standard for judicial review of an agency rule." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547 (1978). Yet, that is precisely what the lower court avowedly did here.

Although *O'Brien* and its progeny may not articulate the precise degree of deference to be accorded to the judgments of an administrative agency or legislative body, this Court's decisions provide clear indications that considerable deference is required. For example, in *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986), a zoning ordinance prohibiting the operation of so-called adult theaters in all but a small portion of the community was upheld as constitutional even though another municipality, on the basis of the same evidence of the harmful secondary effects of such theaters, had adopted a solution which was virtually the opposite of the ordinance before the

Court. Far from condoning a court's substituting of its judgment for that of the agency, this Court held that it was not the function of the judiciary to appraise the wisdom of the choice of means selected by the municipality.

In *Clark* v. *Community for Creative Nonviolence*, 468 U.S. 288 (1984), U.S. Park Service regulations prohibiting "camping," including "sleeping," in certain core parks in Washington were upheld as a reasonable incidental burden on the First Amendment rights of advocates of the homeless who wished to engage in symbolic speech/protest through ongoing demonstrations in those parks. In language that could readily be applied to the instant case, this Court took the lower court to task for basing its decision on what was

> "no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States* v. *O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."

468 U.S. at 299 (footnote omitted).

In *United States* v. *Albertini*, 472 U.S. 675 (1985), the respondent had successfully challenged regulations that prohibited persons holding a military bar letter for having previously engaged in unlawful activity in

the course of a demonstration from returning to the military base even when the general public was invited to the base and the respondent did not threaten to engage in any inappropriate conduct. In reversing, this Court held that *O'Brien* was satisfied when the content-neutral regulation promoted a substantial government interest "that would be achieved less effectively absent the regulation." 472 U.S. at 689. The First Amendment issue does not "turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests." *Id.*

Ignoring these three cases, which were discussed at length in the briefs and in the FCC decisions, the lower court asserted that

> "the Supreme Court has often noted that the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake."

App. 16a. It then went on to discuss three cases that provide very little support for this rather sweeping proposition.[18]

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[18] In Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 815-16 (1984), this Court *upheld* an ordinance prohibiting all political signs and posters on public property despite its conclusion that the city might have drafted an ordinance consistent with its aesthetic goal that would have permitted more opportunities to exercise First Amendment rights. In Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), the Court struck down an ordinance prohibiting any live entertainment in the community, as applied to nude dancing in bars, because the municipality offered no justification whatsoever for singling out live entertainment for restriction. The lower

If allowed to stand, the decision below is likely to cause considerable confusion among the circuit courts with respect to the proper scope of the *O'Brien* test. Even within the D.C. Circuit there are now two seemingly contradictory lines of cases. In contrast to the decision below there is *White House Vigil for the ERA Committee* v. *Clark*, 746 F.2d 1518, 1534 (D.C. Cir. 1984) ("[w]e are not at liberty, however, to replace the agency's judgment with our own. It is sufficient that the means selected be 'narrowly tailored': that they lie within the range of feasible options the agency was constitutionally permitted to consider"). *But see id.* at 1542 (Wald, J. concurring in part and dissenting in part). *See also The Enterprise, Inc.* v. *United States*, 833 F.2d 1216 (6th Cir. 1987).

Even if it were writing on a clean slate, the D.C. Circuit's most recent interpretation of the *O'Brien* test is at best debatable. Although by definition important constitutional interests are at stake, that would not by itself seem to call for a standard of judicial review which puts the courts in the business of micro-managing matters otherwise entrusted to administrative agencies. *Compare United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (Fourth Amendment rights). Moreover, although protection of First Amendment interests is certainly a matter of the highest order and concern, cases from administrative agencies in which

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court's only other citation is to Justice Brennan's opinion concurring in part and dissenting in part in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 658 (1981), in which the majority *upheld* crowd control regulations that prohibited any solicitations, sales or distribution of printed or written material on State Fair grounds other than from specified fixed locations.

regulations are perceived as imposing an incidental burden on protected speech are no less likely than any other administrative agency case to involve complex technical issues that are most appropriately entrusted to an expert agency.

Indeed, the instant case clearly illustrates the hazards of second-guessing of administrative agency decisionmaking by courts which do not deal with those matters on a day-to-day basis. Here, for example, the lower court condemned the agency's solution largely because it apparently misunderstood the nature of the problem. The opinion below assumes that the threat which prompted the FCC decision was the possibility that, without must carry rules, cable systems would abruptly drop all or nearly all of the local broadcast signals they have historically carried. So defined, the panel saw the threat as remote, and thought that, if it occurred, cable subscribers would be quick to make other arrangements in order to continue receiving such an important element in their present package of television service.

In fact, however, the FCC was addressing a much more immediate albeit less apocalyptic problem: As the FCC found, and as the evidence before it amply demonstrated, the threat is one of gradual erosion: initially, newly operational stations that have had no opportunity to build audiences among cable subscribers would not be added to the systems and stations that had been carried only briefly would be dropped. The absence of *new* stations from the cable system is *not* likely to send subscribers scurrying to their hardware stores to buy A/B switches in order to regain access to stations they have been accustomed to watching for many years. Simply put, the lower

court's assumptions that cable operators would not foolishly alienate their subscribers—and that subscribers will react promptly if cable operators were that foolish—may have intuitive appeal but are not relevant to the real issue.[19]

Perhaps the lower court's most glaringly incorrect assumption, which is apparently based on no more than the personal perception of the panel, involves the rapid public acceptance of new technologies. Overlooking the fact that A/B switches hardly qualify as a new technology, having been discussed in an FCC decision some 22 years earlier,[20] the panel opinion ridicules the FCC's judgment with the observation that the way in which home computers and other new technologies have "spread like wildfire" indicates consumers will quickly adjust to buying, installing and

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[19] If the panel below had expertise in communications matters, it might have recognized the parallel between the actual threat to local broadcast service in the absence of must carry regulation and the history of UHF television development. When UHF stations initially came on the air in the 1950s, viewers owned television sets that generally could receive only VHF channels. Because viewers did not race out to buy new sets or inexpensive hardware to convert their existing sets in order to gain access to one or two new UHF stations in addition to the several VHF signals they already received, many of those early UHF stations languished and died. This prompted Congress to pass the all channel receiver legislation prohibiting the shipment in interstate commerce of television sets that cannot receive UHF as well as VHF signals. Although that law took effect in 1962, *see Southwestern, supra*, 392 U.S. at 175 n.42, more than a decade later UHF stations continued to suffer from various competitive "handicaps" vis-a-vis VHF stations. *See, e.g.*, Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 646 (1979).

[20] *See First Report and Order, supra*, 38 F.C.C. at 702-03.

using A/B switches and private antennae. App. 24a. If the panel's perception about the acceptance of new technologies stems from observations among households in which at least one adult earns upwards of $100,000 per year and has a post-graduate degree, it proves an apt illustration of the risks of generalizing from so atypical a sample.[21] The panel's predictive judgment also seems to stem from a misreading of the record.[22]

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[21] By March 1987 only 16 percent of all U.S. homes had home computers, according to Standard & Poor's Industry Surveys, Computer & Office Equipment 91 (Oct. 1, 1987), despite the "boom days" of the early 1980s "when home computers were the big rage." *Id.* By year-end 1986 no more than 5 percent of U.S. households had compact disk-players. Standard & Poor's Industry Surveys, Computer & Office Equipment, Leisure Time 26-27 (March 26, 1987). After being on the market for well over five years, VCRs were expected to reach 50 percent penetration of U.S. households by the end of 1987. *Id.* at 24. But if the VCR acceptance rate is indicative of the extent to which cable subscribers would make adjustments to receive local signals over-the-air, the implication is that, even if A/B switches and outdoor antenna "spread like wildfire," over 20 million American homes (some 50 percent of all cable homes) would *not* make those adjustments and thus would not be able to receive the noncarried stations.

[22] The panel thought that adequate antennae could be acquired for $50 (App. 10a), citing a portion of the record describing the average *initial* cost of antennas purchased in 1973 (12 years before the 1985 survey was conducted). The panel also assumed that adequate switches were readily available and could be purchased for a mere $7.50. It also neglected to note that the FCC in a separate proceeding has concluded that the technical specifications for existing switches had to be upgraded. *See* Report and Order in Docket No. 87-107 (November 20, 1987) (setting technical performance standards for A/B switches).

The lower court also overlooked the *de minimis* nature of the incidental burden of the new must carry rules. The rules found overbroad in *Quincy* required cable systems to carry all "local" signals and defined "local" quite expansively so that there were some instances in which cable systems with very limited channel capacity could not retransmit any cable networks until they invested in improvements to increase channel capacity. The post-*Quincy* rules largely exempt all systems with fewer than 21 useable channels from any must carry obligations, define stations entitled to must carry rights much more narrowly than the former rules, and impose a cap of generally 25 percent on the amount of cable channel capacity that any cable system would have to devote to must carry signals. The very modest burden of the new rules no doubt explains why not one cable network programmer and only 14 cable operators challenged the new rules in the lower court, and why those 14 companies (which own over 200 separate cable systems serving 2.5 million cable subscribers) failed to cite even a single instance in which a cable system had been compelled to drop or was unable to add some other program service as a result of the new must carry rules.

When courts of general jurisdiction attempt to substitute their judgment for that of an administrative agency, glitches and errors of this sort are inevitable. These glitches and errors frustrate legitimate government regulation without advancing First Amendment values.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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